APPENDIX

CITATIONS TO THE RECORD IN THE LOWER COURTS

A. District Court Proceedings.

1. *The complaints.* In separate complaints subsequently consolidated, Travelers Insurance Company ("Travelers") and the Health Insurance Association of America and other trade associations and insurance companies (collectively the "HIAA Plaintiffs") brought suit both as sellers (or associations of sellers) of commercial insurance to ERISA plans and as claims fiduciaries (or associations of claims fiduciaries) of self-insured ERISA plans. Travelers' Complaint ¶¶ 8, 10-13, 21 at JA 68 through JA 86; HIAA Plaintiffs' Amended Complaint ¶¶ 11, 13-17, 19 at JA 87 through JA 104. The HIAA Plaintiffs' complaint alleged that the "vast majority of persons covered by commercial health insurance and self-insured plans, . . . receive that coverage pursuant to employee benefit plans subject to ERISA," HIAA Plaintiffs' Complaint ¶¶ 5, 33 at JA 88-89, JA 97, and that the 13% surcharge would have the effect of forcing both insured and self-insured plans to increase the cost of their benefit plans, to reduce the scope of the benefits provided under their plans, or "to choose other means for [plan] funding," *id.* ¶¶ 5, 6 at JA 88-89; ¶¶ 33-37 (insured plans); 38-41 at JA 97-99 (self-insured plans). See also Travelers' Complaint ¶¶ 58-60 at JA 81-82. Both complaints prayed for a declaration that ERISA preempts the 13% surcharge as applied to self-insured and insured plans and an injunction barring defendants from enforcing that surcharge to self-insured and insured plans. Travelers' Complaint ¶¶ 62-63 at JA 82 & Prayer ¶ (c) at JA 85; HIAA Plaintiffs' Amended Complaint ¶ 53 at JA 101 & Prayer ¶¶ (ii), (iv) at JA 103-04.

2. *The summary judgment motions.* Both Travelers and the HIAA Plaintiffs moved for summary judgment on

various counts of their complaints, including in each case the count in which they claimed that ERISA preempts the 13% surcharge as applied to both insured and self-insured ERISA plans. Travelers' Notice of Motion for Summary Judgment at 2 (Ex. 1 hereto at 9a); Travelers' Complaint Count IV (13% surcharge) at JA 81-82; HIAA Plaintiffs' Notice of Motion at 2 (Ex. 2 hereto at 11a); HIAA Plaintiffs' Amended Complaint Count Two (13% surcharge) at JA 101. Moreover, in support of their motions, plaintiffs filed affidavits replete with statements of fact about self-insured plans, plaintiffs' involvement with them as claims fiduciaries, and the impact upon them of the 13% surcharge. Gutterman Affidavit ¶¶ 1-5, 7-9, 15-19, 25 at JA 115-118, JA 120-21, JA 122; Musco Affidavit ¶¶ 4, 6, 13-14 at JA 123-25; Donnelly Affidavit ¶¶ 4, 6 at JA 127-28; D'Amico Affidavit ¶ 4 at JA 130; Welch Affidavit ¶¶ 3-9, 11, 13 at JA 131-34; Shapland Affidavit ¶¶ 8, 9 at JA 140; Sujecki Affidavit ¶¶ 1,5, 6 at JA 298, JA 300.

That the summary judgment motions sought resolution of the issue of ERISA preemption of the 13% surcharge as applied to self-insured plans is also indicated in the affidavits submitted by defendants. Anderman Affidavit ¶¶ 28, 29 at JA 156-57; Klein Affidavit ¶ 43 at JA 189.

3. *The district court's decision.* The district court by order of February 4, 1993, granted plaintiffs' motions for summary judgment in all respects pertaining to the 13% surcharge. In addition, the court enjoined defendants from enforcing that surcharge (and the other surcharges that plaintiffs had challenged) "against any commercial insurers or HMOs in connection with their coverage of any ERISA plans." Pet. App. at 89-90.

In discussing the inapplicability of ERISA's insurance saving clause to self-insured plans, the district court held, citing *FMC Corporation* v. *Holliday*, 498 U.S. 52 (1990), that "those portions of the 13% Surcharge re-

ferring to self-insured plans could not possibly fall within the scope of the savings clause because . . . self-insured plans do not engage in the 'business of insurance' as a matter of law." Pet. App. at 79.[1] The court also ruled that, as a matter of law, HMOs are not engaged in the business of insurance. *Id.* at 79 & n.14.

In addition to granting summary judgment to plaintiffs with respect to the surcharges, the district court's order also enjoined enforcement of the surcharges against "any commercial insurers or HMOs in connection with their coverage of any ERISA plans." Pet. App. at 89-90.

4. *The district court's stay and related order.* Plaintiffs did not appeal the court's grant of summary judgment to them. Defendants, however, did appeal. They also moved to stay the district court's February 4, 1993, order pending appeal.

In opposition to defendants' stay motion—which the district court granted on February 9, 1993, but only with respect to the 13% surcharge, Pet. App. at 98—Travelers submitted the affidavit of Timothy F. Lyons. The Lyons Affidavit stated that the 13% surcharge applies to both insured and self-insured plans, Lyons Affidavit ¶ 8 at JA 324; that Travelers "is not even in a position to continue paying the surcharge with regard to its self-insured ERISA customers," id. ¶ 12 at JA 325; that because ERISA obli-

[1] To be sure, the court stated elsewhere in its opinion that the "Surcharges do not directly increase a plan's costs or effect the level of benefits to be offered. However, there can be little doubt that the Surcharges at issue will have a significant effect on the commercial insurers and HMOs which do or could provide coverage for ERISA plans and thus lead, at least indirectly, to an increase in plan costs" because plaintiffs will pass the surcharge on to their plan customers. Pet. App. at 71 (footnotes omitted). This analysis ignores self-insured plans since they themselves pay the surcharge. There is no passing through from insurer to plan in the form of higher premiums. Rather, the surcharge directly increases the plan's costs.

gates plan fiduciaries to use plan funds for the exclusive benefit of plan participants and beneficiaries, fiduciaries of self-insured plans could be expected to "refuse to continue to pay the 13% surcharge," *id.*; and that two non-party, self-insured plans for which Travelers provides administrative claims services had in late 1992 instructed Travelers "not to use any plan assets to pay the 13% surcharge" because the self-insured plans had concluded that ERISA preempted the 13% surcharge as applied to them, *id.* The self-insured plans to which the Lyons Affidavit referred were the Railroad Plans.

Shortly after the district court had stayed its order as to the 13% surcharge, Travelers advised the court by letter that the Railroad Plans had informed Travelers that the Plans' prior instruction not to pay the surcharge remained in effect. (Ex. 3 hereto at 14a.) The intervening defendants, in letters to the court, objected to nonpayment of the 13% surcharge by the Railroad Plans. (Exs. 4, 5 hereto at 17a, 20a.)[2] The NCCC also wrote to the district court explaining the NCCC's position as fiduciaries of the Railroad Plans. (Ex. 7 hereto at 25a.)

The district court resolved the dispute in an April 27, 1993, order that contained the following recitations:

> "WHEREAS . . . this Court held that federal law preempts certain provisions of the New York Public Health Law, including the 13% differential . . . ; and WHEREAS . . . this Court granted defendants' motion for a stay pending appeal of such . . . Order insofar as it concerns the 13% differential; and WHEREAS . . . two self-insured ERISA plans for which Travelers provides administrative services—[the Railroad Plans]—had instructed Travelers not to pay the 13% differential. . . ."

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[2] Travelers responded in writing to intervening defendants' letters to the court. (Ex. 6 hereto at 23a.)

Furthermore, the order itself provided:

> "[T]he named parties to this action, including Travelers, in its capacity as claims fiduciary of the Railroad Plans, are directed to pay the 13% differential with respect to all hospital claims, where applicable [under New York's Public Health Law], whether incurred before or after the date hereof." (Ex. 8 hereto at 30a-31a.)

The court noted that its order applied to the trade association plaintiffs "only to the extent they serve directly as fiduciaries of ERISA plans" and that the order "does not impose on any person any obligation to pay the 13% differential except to the extent such obligation otherwise exists under the relevant contracts and/or New York law." *Id.*

B. Court of Appeals Proceedings.

1. *The briefs.* The briefs submitted on appeal by the appellants argued that ERISA did not preempt the 13% surcharge as applied to self-insured plans. The brief of intervenors-defendants-appellants The New York State Conference of Blue Cross and Blue Shield Plans and Empire Blue Cross and Blue Shield (hereinafter "the Blues") stated: "[I]f New York is prohibited from charging commercial insurers and self-insured plans the DRG rate including the differentials, it is highly speculative what rate these payors will be required to pay." Brief at 21 (hereinafter "Blues App. Br."). In addition, the Blues acknowledged that the surcharges "discriminate against commercial insurers and self-funded plans by increasing their costs," *id.* at 29, and argued in response that "[c]ountless state laws will influence a plan's decision regarding whether to self-insure or purchase insurance from a commercial insuror or from a Blue Plan," *id.* at 30. See also *id.* ("[a]ny law or regulation which lowers the Plans' costs of doing business . . . would . . . impact commercially insured and self-insured ERISA

plans"); Blues App. Reply Br. at 1, 3, 5 n.6 (further attempts to refute discriminatory basis of 13% surcharge).[3]

The Blues responded directly to the contention in the *amicus* brief of the NCCC that the Railroad Plans would have to become insured through the Blues in New York to avoid payment of the 13% surcharge, Blues App. Reply Br. at 10 n.11, and that the surcharge hindered the uniform operation of self-insured plans nationwide, *id.* at 9-10. Finally, the Blues challenged the district court's ruling that the saving clause does not apply to self-insured plans and further argued that the deemer clause is similarly inapplicable. Blues App. Br. at 37-40.[4]

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[3] The briefs of the State of New York ("State") and the Hospital Association of New York State ("HANYS") generally treated all payors of the 13% surcharge collectively, and made few argumentative distinctions among them. Hence, most of their references to self-insured plans were merely descriptive of the statute. Brief for Defendants-Appellants State at 5, 7, 20, 28 n.32, 36 (hereinafter "State App. Br."); Brief on Appeal for Intervenor-Defendant-Appellant HANYS at 21, 25-26, 35 (hereinafter "HANYS App. Br."); HANYS App. Reply Br. at 2, 3, 9, 17. Additional references to self-insured plans were made in connection with appellants' contentions that the statute did not discriminate among payors based on their ERISA status; that uniform costs between the Blues and commercial insurers/self-insured plans could never be achieved; or that no evidence existed that the surcharge increased the cost of self-insured plans or otherwise provided an incentive for them to switch to the Blues. State App. Br. at 7, 20, 21; State App. Reply Br. at 5, 8-9, 8 n.11, 10 n.15; HANYS App. Reply Br. at 3, 5-6, 8-9, 15-16; Petition for Rehearing with Suggestion *En Banc* for Intervenor-Defendant-Appellant-Cross-Appellee HANYS at 2, 5, 8.

[4] Plaintiffs/appellees understood that appellants were challenging in the court of appeals the district court's ruling that the 13% surcharge was preempted by ERISA as applied to all applicable entities, including self-insured plans. App. Br. for the HIAA Plaintiffs-Appellees and Plaintiff-Appellee-Cross-Appellant Travelers at 2, 3, 7, 8, 11, 12, 13, 14, 18, 21, 22, 25, 29, 35, 36, 39, 45, 46, 47, 49-50, 62-65.

2. *The opposition to the filing of an amicus brief by the NCCC.* Counsel for intervenor-defendant-appellant HANYS submitted an affidavit (Ex. 9 hereto at 32a) opposing the NCCC's motion for leave to file an *amicus* brief with the court of appeals. Paragraphs 3 and 4 of the affidavit stated:

> "First, the Court already has been favored with briefs from five sets of parties and from four amicus curiae, covering all of the issues. In particular, the interests of all self-insured plans, and the Railroad Plans specifically, are already represented. Plaintiff The Travelers Insurance Company ("Travelers") acts as fiduciary or otherwise provides administrative services to self-insured plans, including the Railroad Plans. Travelers has specifically lodged its complaint in such capacity. *See* JA-57-63. The additional brief which the Railroad Plans seek to submit is merely cumulative and does not provide the Court with any new positions or perspectives necessary for a full presentation of the issues.
>
> More importantly, Intervenor-Appellant Hospital Association of New York State did not consent to the Railroad Plans filing an amicus brief because of the Plans' violation of the Stay Order of the District Court. A copy of our letter on behalf of the Hospital Association is annexed hereto. As the Railroad Plans' April 14, 1993 memorandum of law in support of their motion acknowledges (at p. 3), the Railroad Plans have chosen to defy New York law and have refused to continue paying the 13% differential on hospital charges which is at issue on this appeal. While the court below found that differential preempted by federal law, the court stayed the portion of its Order directed to such 13% differential, pending the outcome of this appeal. *See* JA-1863-69. Accordingly, the 13% differential remains in effect, and the Railroad Plans' refusal to pay it amounts to

willful defiance of the Stay Order and/or state law." Ex. 9 ¶¶ 3-4 at 33a-34a.

3. *The court's decision.* The court of appeals' opinion made few differentiations as to any one surcharge and almost none as to payor status. For example, the court stated that the "13% and 11% surcharges are designed to increase hospital costs for patients covered by health plans other than the Blues, and thus make these competing plans less attractive than the Blues . . . . Thus, the surcharges purposely interfere with the choices that ERISA plans make for health care coverage." JA 52. See also JA 53 ("The surcharges substantially increase the cost to ERISA plans of providing beneficiaries with a given level of health care benefits." "[T]he surcharges here force ERISA plans to increase either plan costs or reduce plan benefits.").

The court of appeals also addressed in a general fashion the application of the saving clause to the surcharges, concluding that the 13% and 11% surcharges do not "regulate insurance." JA 56. Although "the surcharge laws provide for different payment rates based on whether a patient is uninsured, covered by an HMO, a commercial insurer or a self-insured health plan," the surcharge laws did not address matters typically within the purview of state insurance regulations. JA 57. Again, the court's analysis of the saving clause did not rely on differences in payor status.

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 3999 (LJF)
(CM 0773)

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

-against-

MARIO M. CUOMO, in his Official Capacity as Governor of the State of New York, MARK CHASSIN, M.D., in his Official Capacity as Commissioner of Health of the State of New York, and SALVATORE R. CURIALE, in his Official Capacity as Superintendent of Insurance of the State of New York,
Defendants,

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,
Intervenors.

NOTICE OF MOTION
FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that upon the accompanying affidavit of Darrell M. Joseph, sworn to August 20, 1992, and the exhibit thereto, the accompanying affidavit of James M. Gutterman, sworn to August 17, 1992, and the exhibits thereto, the annexed Amended Statement pursuant to Rule 3(g) of the Civil Rules of this Court and the accompanying memorandum of law, plaintiff The Travelers Insurance Company, by its attorneys, Windels, Marx, Davies & Ives, will move this Court, before the Honorable Louis J. Freeh, United States District Judge,

in Courtroom 312, United States Courthouse, 40 Centre Street, Foley Square, New York, New York 10007, on the 21st day of August, 1992, at 9:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 56(c) of the Federal Rules of Civil Procedure granting summary judgment in its favor and against defendants on the ground that there exists no genuine issue as to any material fact with respect to Counts I, IV and VI of plaintiff's Complaint, and that plaintiff is entitled to judgment as a matter of law, and granting plaintiff such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the schedule previously agreed to by the parties and approved by the Court, as reflected in the Court's endorsement of plaintiff's counsel's letter to the Court of August 11, 1992, filed on August 12, 1992, the parties shall adhere to the following briefing schedule: (1) defendants' (including intervenors') papers in opposition to plaintiff's motion and in support of any cross-motions for summary judgment are due to be served on or before October 2, 1992; (2) plaintiff's reply papers are due to be served on or before October 16, 1992; and (3) any additional papers from defendants (including intervenors) are due to be served on or before October 22, 1992.

Dated: New York, New York
August 21, 1992

WINDELS, MARX, DAVIES & IVES

By: /s/ Craig P. Murphy
CRAIG P. MURPHY (CM 0773)

Attorneys for Plaintiff
The Travelers Insurance Company
156 West 56th Street
New York, New York 10019
(212) 237-1000

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 5419 (LJF)

THE HEALTH INSURANCE ASSOCIATION OF AMERICA, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE LIFE INSURANCE COUNCIL OF NEW YORK, INC., AETNA LIFE INSURANCE COMPANY, AETNA HEALTH PLANS OF NEW YORK, INC., MUTUAL OF OMAHA INSURANCE COMPANY, THE UNION LABOR LIFE INSURANCE COMPANY, and PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC. TRUST,

Plaintiffs,

-against-

MARK CHASSIN, M.D., in his Official Capacity as Commissioner of Health of the State of New York, MARY JO BANE, in her Official Capacity as Commissioner of Social Services of the State of New York, SALVATORE R. CURIALE, in his Official Capacity as Superintendent of Insurance of the State of New York, and ROBERT ABRAMS, in his Official Capacity as Attorney General of the State of New York,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the pleadings; the annexed statement pursuant to Rule 3(g) of the Civil Rules for the Southern District of New York; the accompanying Affidavits of Thomas D. Musco, and the annexed exhibit, executed on August 18, 1992, Vincent W. Donnelly, executed on August 18, 1992, Raymond A. D'Amico, executed on August 13, 1992, Mark R. Welch, executed on August 18, 1992, John P. Burke, executed

on August 19, 1992, Robert B. Shapland, executed on August 14, 1992, James R. Hibbitts, executed on August 13, 1992, Thomas L. Reddy, Sr., executed on August 17, 1992, and Angelo V. D'Ascoli, executed on August 19, 1992; the undersigned will move this Court, the Honorable Louis J. Freeh presiding, in Room 540, United States Courthouse, Foley Square, New York, New York, on October 26, 1992, at 9:00 a.m. or as soon thereafter as counsel may be heard, for an order:

(a) pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, granting summary judgment in favor of all plaintiffs and against all defendants on counts one through three of the Amended Complaint and enjoining enforcement of, and declaring invalid, Section 2807-c(1)(b) of the New York Public Health Law and Sections 346 and 348 of the New York Omnibus Revenue Act of 1992, insofar as they impose Surcharges increasing hospital charges for patients covered by employee welfare plans subject to ERISA that use commercial insurance, self-insurance, or health maintenance organizations to provide benefits to participants or beneficiaries; and

(b) granting plaintiffs such other and further relief as the Court may deem just and proper.

Further grounds for this motion are set forth in the accompanying memorandum of law.

Dated: New York, New York
August 21, 1992

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: /s/ Sidney S. Rosdeitcher
SIDNEY S. ROSDEITCHER (SR-3127)
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Plaintiffs The Health Insurance Association of America, The American Council of Life Insurance, The Life Insurance Council of New York, Inc., Mutual of Omaha Insurance Company, The Union Labor Life Insurance Company, and Professional Insurance Agents of New York, Inc. Trust

HOGAN & HARTSON

By: /s/ Clifford D. Stromberg
CLIFFORD D. STROMBERG
(CS-3510)
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Plaintiffs Aetna Life Insurance Company and Aetna Health Plans of New York, Inc.

EXHIBIT 3

WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, NY 10019
(212) 237-1000

March 24, 1993

Craig P. Murphy
(212) 237-1234

BY HAND

Hon. Louis J. Freeh
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street, Room 540
New York, New York 10007-9998

Re: The Travelers Ins. Co. v. Cuomo, *et al.*,
No. 92 Civ. 3999 (LJF)

Dear Judge Freeh:

I represent plaintiff The Travelers Insurance Company in connection with the above matter. I am writing to inform the Court of a recent development concerning the partial stay pending appeal which this Court granted on February 9, 1993.

On February 3, 1993, this Court granted plaintiff's motion for summary judgment and enjoined defendants from enforcing the three hospital surcharges at issue in this litigation on the grounds that they are preempted by ERISA. On February 9, 1993, this Court stayed its February 3 order to the extent it enjoined enforcement

of the 13% surcharge, but denied a stay of the order regarding the 9% and 11% surcharges.

As Your Honor knows, The Travelers brought this suit in its capacity as fiduciary of two ERISA plans, the B.H. Aircraft Plan and the Sheridan Catheter Plan, under Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). These plans are described, respectively, in paragraphs 18 and 21 of the complaint. The Travelers also provides commercial health insurance and/or administrative services in connection with other ERISA plans.

In the affidavit of Timothy F. Lyons, Esq., sworn to on February 8, 1993, which was submitted in opposition to the defendants' and certain intervenors' motions for a stay pending appeal, The Travelers explained that in late 1992, two non-party self-insured ERISA plans had instructed The Travelers to stop using plan assets to pay the 13% surcharge. The plans at issue are the Railroad Employees National Early Retirement Major Medical Benefit Plan and the Railroad Employees National Health and Welfare Plan (referred to collectively as "the Railroad Plans").

Following this Court's February 9, 1993 stay order, The Travelers again communicated with the Railroad Plans regarding the 13% surcharge. Within the last few days, the Committees charged with governance of the Plans have advised The Travelers that in light of the fact that the Railroad Plans are not parties to the case in which this Court's orders of February 3 and 9, 1993 were issued, and in consideration of the prohibition laid down by ERISA that plan assets not be disbursed to provide benefits for persons other than plan participants and beneficiaries, the Committees could not, consistently with their fiduciary duties under applicable law, reverse their earlier instructions to The Travelers and authorize the use of plan assets to pay the 13% surcharge.

Because the Railroad Plans are not parties to this litigation, it is our understanding that they are not subject

to this Court's February 9, 1993 stay order. Accordingly, The Travelers has concluded that it must follow the instructions of the Railroad Plans. However, because The Travelers, in its capacity as fiduciary of the B.H. Aircraft Plan and the Sheridan Catheter Plan, is a party to this litigation and subject to the stay order, I wanted to bring this matter to Your Honor's attention. I also wish to note that during the pendency of the appeal from Your Honor's February 3 order, The Travelers will continue paying the 13% surcharge on behalf of the Sheridan Catheter Plan, the B.H. Aircraft Plan and the other ERISA plans in connection with which The Travelers provides commercial health insurance. The Travelers has also recommended that all self-insured ERISA plans which receive administrative services from The Travelers continue paying the 13% surcharge.

Very truly yours,

/s/ Craig P. Murphy
CRAIG P. MURPHY

CPM:dr

cc: All Counsel in 92 Civ. 3999 (LJF), and 92 Civ. 5419 (LJF) (by facsimile)

bcc: Benjamin W. Boley, Esq. (by facsimile)
James M. Michener, Esq. (by facsimile)
Timothy F. Lyons, Esq. (by facsimile)
Darrell M. Joseph, Esq.

All HIAA Action Plaintiffs (by facsimile) (except the Aetna entities)

EXHIBIT 4

BREED, ABBOTT & MORGAN
Citicorp Center
153 East 53rd Street
New York, N.Y. 10022-4858

(212) 888-0800

March 29, 1993

BY HAND

Hon. Louis J. Freeh
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: *Travelers v. Cuomo*, 92 Civ. 3999 (LJF)

Dear Judge Freeh:

In his March 24, 1993 letter, Travelers' attorney, Craig Murphy, Esq., informs the Court that two self-insured ERISA plans for which Travelers acts as fiduciary have instructed Travelers to refuse to pay the 13% hospital differential, and that Travelers has chosen to abide by such position. This letter responds on behalf of intervenors Empire Blue Cross and Blue Shield and The New York State Conference of Blue Cross and Blue Shield Plans and, in accord with Your Honor's pre-motion procedures, prays leave to move for an Order enforcing your February 9, 1993 Order (the "Stay Order") and for whatever other relief this Court may deem appropriate.

The basic premise of Mr. Murphy's letter is inconsistent with Travelers' position in this action and is incorrect as a matter of law and fact. As purported justification

for the failure of these plans to pay the 13% differential, Mr. Murphy asserts: "Because the Railroad Plans are not parties to this litigation, it is our understanding that they are not subject to this Court's February 9, 1993 stay order." Thus, Mr. Murphy presses for the bizarre result that as supposed non-parties, the Railroad Plans obtain rights pursuant to the Court's February 3, 1993 decision greater than the parties themselves.

The effect of the Stay Order is to leave the 13% differential in place and applicable to all entities subject to it. Under the stay, the 13% remains the law, and the Railroad Plans, like all other similarly situated persons, continue to be obligated to pay it. Indeed, Mr. Murphy appears not to dispute but rather to acknowledge that State law requires payment of the 13% differential, stating: "The Travelers has also recommended that all self-insured ERISA plans which receive administrative services from The Travelers continue paying the 13% surcharge."

The Stay Order applies to Travelers with respect to all of the ERISA plans, whether fully insured or self-funded, for which Travelers acts as a fiduciary. Indeed, in its complaint, Travelers appears to sue not only on its own behalf but also on behalf of those ERISA plans for which it acts as a fiduciary. In fact, in Travelers' capacity as fiduciary, Travelers advised this Court, through ¶¶ 12-13 of the Lyons Affidavit submitted in opposition to Defendants' motion for a stay, of the very same information set forth in Mr. Murphy's current letter, *i.e.*, that self-insured plans would refuse to pay the differential and would direct Travelers not to pay it. This Court ruled against Travelers on the motion, finding specifically that ". . . ERISA plans . . . will only suffer monetary damages if the court's Order is stayed during appeal." Stay Order at 5. Now, once again, Travelers attempts to be relieved of its responsibility as fiduciary to make the payments. This action cannot be countenanced by the Court.

In any event, these plans are bound by Your Honor's Orders and subject to "contempt" as persons with "actual

notice" of the decree[s] of February 3 and 9, 1993. *Vuitton v. Carousel Handbags,* 592 F.2d 126, 129-30 (2d Cir. 1979). Particularly so where, as here, both such plans are plainly acting in concert with the plaintiff in this litigation, Travelers. *See* Fed. R. Civ. P. 65(d).

By refusing to pay the 13% differential, Travelers, as the fiduciary for these two Railroad Plans, has violated the law and is subject to whatever penalties and remedies may be available to the State and any other relevant person. Moreover, by altering the status quo they would appear exposed to whatever sanctions or other corrective actions this Court may deem in order, regardless of what decision ultimately may emanate from the Court of Appeals. *Cf. United States v. United Mine Workers,* 330 U.S. 258 (1947).[1] Such relief appears called for because the sole grounds asserted for failure to comply is an obvious misreading, indeed flouting, of Your Honor's Stay Order. It is of this Court's Stay Order that we would seek enforcement.

Respectfully,

/s/ Robert A. Bicks
ROBERT A. BICKS
BARTLEY J. COSTELLO

cc: All counsel

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[1] The law is clear that under Fed. R. Civ. P. 62(c), the district court has jurisdiction to issue injunctions or other orders which preserve the status quo pending appeal. *See International Ass'n v. Eastern Airlines, Inc.,* 847 F.2d 1014, 1018 (2d Cir. 1988) (noting that Fed. R. Civ. P. 62(c) permits the district court to issue orders which preserve the status quo pending appeal). Moreover, as a leading commentator has stated: "[I]t has been held that the district court, which has granted an injunction pending appeal, may consider whether defendant is in contempt for violation of that order, even while the appeal is still pending." C. Wright & A. Miller, *Federal Practice and Procedure,* § 2905 at 325.

EXHIBIT 5

SHERRIN & GLASEL
Attorneys & Counselors at Law
74 North Pearl Street
Albany, New York 12207

(518) 465-1275

March 30, 1993

Hon. Louis J. Freeh
United States District Court
United States Courthouse
Foley Square
40 Centre Street, Room 540
NY, NY 10007-9998

Original Via Overnight Mail
Copy Via Hand Delivery

Re: *Travelers, et al. v. Cuomo, et al.*, 92 Civ. 3999, (LJF)

Dear Judge Freeh:

We are writing on behalf of the Hospital Association of New York State in response to the March 24, 1993 letter from Windels, Marx, Davies & Ives, attorneys for Travelers Insurance Company, wherein the Court is advised that Travelers is refusing to pay the 13% differential with respect to participants in two Railroad Plans. The justification presented for this refusal is that these Plans are not parties to the litigation, bound by the Court's Stay Order of February 9, 1993, and that Travelers is merely following the Plans' instructions. We are requesting the opportunity to seek affirmative relief from this Court, which may include a contempt order or other sanctions, an enforcement order or an appropriate clarification of the Stay Order with respect to the obligation of

these and other plans and commercial insurers to comply with the mandate of the Public Health Law.

In its Stay Order, this Court held that "loss of the 13% Surcharge will cause a substantial and irreparable disruption in the functioning of and services provided by New York's hospitals." (Stay Opinion and Order, p. 5). Further, this Court held that "the public interest in financially-stable hospitals and uninterrupted hospital services outweighs that monetary harm, and supports the imposition of a stay as to the 13% Surcharge." (Stay Opinion and Order, p. 5). The very purposes for issuance of the stay will be frustrated if a party to the action, Travelers, can with impunity ignore the Stay Order and the Public Health Law simply by claiming that the Plans, on whose behalves it sued as a fiduciary, are not bound by the Order.

Contrary to Travelers' assertion, these Plans are bound both by the Court's Order and by the Public Health Law, which imposes the 13% obligation. Travelers sued as fiduciary on behalf of ERISA plans, including the two Railroad Plans. Certainly, Travelers and the Plans fully expected to have the Plans enjoy the benefits of a judgment in Travelers' favor. If their position is that these two Plans are not bound by the Stay Order because they are not parties, then they are also not entitled to the fruits of the litigation. They would remain required to comply with the Public Health Law, even if Plaintiffs ultimately prevail. In any event, Travelers is bound by the Stay Order and the Public Health Law and must pay the 13%. A fiduciary is bound to act in conformance with law and judicial direction; it may not disregard its legal obligations on the excuse that its clients directed it to do so.

It is the intention of the Defendant-Intervenor Hospital Association of New York State to move this Court for an order enforcing or, if necessary, clarifying the Stay Order of February 9, 1993. The Court may, however, wish to schedule a telephone conference call among the parties

preliminary to the filing of any motion. We respectfully await your advice.

Respectfully submitted,

SHERRIN & GLASEL, ESQS.

/s/ Jeffrey J. Sherrin
JEFFREY J. SHERRIN

JJS/cl

cc: All counsel
(Via fax and overnight mail)

EXHIBIT 6

WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, NY 10019
(212) 237-1000

March 31, 1993

BY HAND

Hon. Louis J. Freeh
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street, Room 540
New York, New York 10007-9998

Re: The Travelers Ins. Co. v. Cuomo, *et al.*,
No. 92 Civ. 3999 (LJF)

Dear Judge Freeh:

I am writing in response to the letters submitted on behalf of the Hospital Association of New York and Blue Cross/Blue Shield in response to my letter of March 24, 1993. The thrust of those letters is that The Travelers should be held in contempt or sanctioned for deliberately violating this Court's February 9, 1993 order. There is absolutely no basis for the imposition of sanctions or a finding of contempt against The Travelers.

As I previously explained in my March 24, 1993 letter, the committees charged with the governance of the Railroad Plans concluded that they could not, consistent with their fiduciary duties, allow the use of plan assets to pay the 13% surcharge. They have, therefore, instructed The

Travelers not to use plan assets for that purpose. After reviewing the situation, The Travelers decided that it had to obey these instructions since the Railroad Plans were not parties to this litigation and, therefore, not subject to the stay order. Recognizing, however, that others might disagree, The Travelers brought the situation to Your Honor's attention.

If The Travelers has misinterpreted the scope of this Court's stay order—which I believe is unlikely since this Court did not enter an injunction directing nonparty ERISA plans to continue paying the 13% surcharge but only stayed its earlier injunction prohibiting State officials from enforcing the surcharge—then the scope of this Court's February 9 order should be clarified. If, on the other hand, the Hospital Association or some other party wishes to expand the scope of this Court's February 9 order, then it should make the appropriate motion to do so.

Under no circumstances, however, should The Travelers be criticized or sanctioned for having forthrightly brought this matter to Your Honor's attention.

Very truly yours,

/s/ Craig P. Murphy
CRAIG P. MURPHY

CPM:dr

cc: All Counsel in 92 Civ. 3999 (LJF), and 92 Civ. 5419 (LJF) (via facsimile)

bcc: Benjamin W. Boley, Esq. (via facsimile)
James M. Michener, Esq. (via facsimile)
Timothy F. Lyons, Esq. (via facsimile)
Darrell M. Joseph, Esq.

All HIAA Action Plaintiffs (via facsimile)

EXHIBIT 7

SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

April 6, 1993

VIA EXPRESS MAIL

Hon. Louis J. Freeh
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street, Room 540
New York, NY 10007-9998

Re: The Travelers Insurance Co. v. Cuomo, et al.
No. 92 CV 3999 (LJF)

Dear Judge Freeh:

We write this letter on behalf of the National Carriers' Conference Committee ("NCCC") as fiduciaries of The Railroad Employees National Health and Welfare Plan and The Railroad Employees National Early Retirement Major Medical Benefit Plan.[1] These plans, which provide for health benefits on a self-insured basis, have been collectively bargained on a national level by numerous railroads and railway labor organizations. They are referred to as the "Railroad Plans" in the letters sent to you by counsel for The Travelers Insurance Company dated March 24 and 31, 1993. Counsel for Travelers has pro-

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[1] The NCCC is the governing body of fiduciaries for The Railroad Employees National Early Retirement Major Medical Benefit Plan, and, along with the Health and Welfare Committee, Cooperating Railway Labor Organizations, forms the governing body of fiduciaries for The Railroad Employees National Health and Welfare Plan.

vided us with copies of those letters, as well as copies of the letters sent to you on March 29 and March 30 by counsel for intervening defendants.

As fiduciaries of the Railroad Plans, the members of the NCCC are obligated by § 404(a)(1) of ERISA to discharge their duties to the Plans solely in the interests of Plan participants and beneficiaries and for the exclusive purpose of providing benefits to them and of defraying the reasonable expenses of administering the Plans. The NCCC members consider that this obligation requires that they, as Plan fiduciaries, not allow the disbursement of the assets of the nationwide Railroad Plans to pay a surcharge on general hospital bills that, as this Court concluded, is "simply designed to reduce the attractiveness of particular forms of medical coverage, in order to make [Blue Cross/Blue Shield] more competitive" in the State of New York, and that is considered by the Labor Department,[2] and, more significantly, by this Court, to be preempted by ERISA as applied to self-insured plans.

In short, as fiduciaries of the Railroad Plans, the members of the NCCC have sought only to carry out what they perceive their fiduciary duties to be. Consonant with that perception, the Railroad Plans have instructed Travelers not to pay the 13% surcharge. These instructions were given almost five months before the decision rendered by the Court in this case on February 3.

The NCCC does not understand that the Court, by its stay order of February 9, intended to override the duties owed to the Railroad Plans by their fiduciaries and to require disbursement of Railroad Plan assets to pay the 13% surcharge. The Court's February 9 order simply stayed its February 3 order enjoining enforcement of the 13% surcharge. The Court did not affirmatively order

[2] Brief for Secretary of Labor as Amicus Curiae at 9, *The Travelers Insurance Co. v. Cuomo* (No. 93-7132) ("It is the Secretary's position that ERISA preempts the surcharges as to self-funded plans, but not as to commercial insurers.")

payment of the surcharge. Surely, the Railroad Plans may not be held in contempt of an order that did not command performance by anyone—no less the Plans, which are not parties to the litigation—of the act that the Plans have not performed. *See International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967); *Town of Islip* v. *Eastern Air Lines, Inc.*, 793 F.2d 79, 83 (2nd Cir. 1986); *Stotler & Co.* v. *Able*, 870 F.2d 1158, 1163-64 (7th Cir. 1989); *Lichtenstein* v. *Lichtenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970).

Perhaps in recognition of this proposition, counsel for intervening defendants have indicated their desire to move for an order requiring the Railroad Plans to pay the 13% surcharge. The Railroad Plans, however, are not parties to this action. Nor are they acting in concert with any party before the Court. Thus, the Court would appear to lack authority to enter the kind of an order counsel seems to have in mind. *See* Fed. R. Civ. Pro. 65(d); *Regal Knitwear* v. *National Labor Relations Bd.*, 324 U.S. 9, 14 (1945); *Heyman* v. *Kline*, 444 F.2d 65, 66-67 (2nd Cir. 1971); *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 832-33 (2nd Cir. 1930); *O & L Associates* v. *Del Conte*, 601 F.Supp. 1463, 1464-65 (S.D.N.Y. 1985).

Furthermore, because a notice of appeal has been filed, the Court's jurisdiction to issue orders is limited to those necessary to preserve the status quo pending appeal. *See* Fed. Rule Civ. Pro. 62(c); *International Ass'n of Machinists* v. *Eastern Air Lines, Inc.*, 847 F.2d 1014, 1018 (2nd Cir. 1988); *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F.2d 623, 625 (2nd Cir. 1962); *McClatchy Newspapers* v. *Central Valley Typographers Union No. 46*, 686 F.2d 731, 735 (9th Cir. 1982). Requiring the Railroad Plans to pay the 13% surcharge would alter the status quo rather than preserve it, because the Railroad Plans stopped paying the surcharge about four or five months before the Court rendered its February 3 decision.

The NCCC does not propose that the Plans ignore any lawful obligation they may have to the State of New York and its hospitals. If, in the end, the 13% surcharge is upheld, the Plans will pay it retroactively, and there can be no doubt of their capacity to do so.

Respectfully yours,

/s/ Benjamin W. Boley
BENJAMIN W. BOLEY

BWB/skb

cc: All counsel (Advance copy by fax)

EXHIBIT 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

92 Civ. 3999 (LJF)

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

NEW YORK STATE HEALTH MAINTENANCE ORGANIZATION CONFERENCE, *et al.*,
Intervenor,

- against -

MARIO M. CUOMO, in his Official Capacity as Governor of the State of New York, *et al.*,
Defendants,

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,
Intervenors.

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92 Civ. 5419 (LJF)

THE HEALTH INSURANCE ASSOCIATION OF AMERICA, *et al.*,
Plaintiffs,

NEW YORK STATE HEALTH MAINTENANCE ORGANIZATION CONFERENCE, *et al.*,
Intervenors,

- against -

MARK CHASSIN, M.D., in his Official Capacity as Commissioner of Health of the State of New York, *et al.*,
Defendants.

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,

Intervenors.

ORDER

WHEREAS by Order, dated February 3, 1993, this Court held that federal law preempts certain provisions of the New York Public Health Law, including the 13% differential set forth in § 2807-c(1)(b) thereof and applicable to certain hospital charges ("the 13% differential"); and

WHEREAS by Order, dated February 9, 1993, this Court granted defendants' motion for a stay pending appeal of such February 3, 1993 Order insofar as it concerns the 13% differential; and

WHEREAS by letter, dated March 24, 1993, plaintiff The Travelers Insurance Company ("Travelers") informed the Court that two self-insured ERISA plans for which Travelers provides administrative services—the Railroad Employees National Early Retirement Major Medical Benefit Plan and the Railroad Employees National Health and Welfare Plan (collectively "the Railroad Plans")—had instructed Travelers not to pay the 13% differential, and that Travelers was following such instruction and not paying the 13% differential with respect to the Railroad Plans;

IT IS HEREBY ORDERED that pending a determination by the United States Court of Appeals for the Second Circuit of the appeals from this Court's February 3, 1993 order, the named parties to this action, including Travelers, in its capacity as claims fiduciary of the Railroad Plans, are directed to pay the 13% differential with respect to all hospital claims, where applicable under Sec-

tion 2807-c(1)(b) of the New York Public Health Law, whether incurred before or after the date hereof. This order applies to plaintiffs Health Insurance Association of America, American Council of Life Insurance, and Life Insurance Council of New York, Inc. only to the extent they serve directly as fiduciaries of ERISA plans.*

SO ORDERED.

New York, New York

April 27, 1993

/s/ Louis J. Freeh
LOUIS J. FREEH
U.S.D.J.

* This order does not impose on any person any obligation to pay the 13% differential except to the extent such obligation otherwise exists under the relevant contracts and/or New York law.

EXHIBIT 9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

93-7132L
93-7134CON
93-7148CON
93-7194XAP

THE TRAVELERS INSURANCE COMPANY,
Plaintiff-Appellee,

NEW YORK HEALTH MAINTENANCE ORGANIZATION CONFERENCE,
Intervenor-Appellee,

v.

MARIO M. CUOMO, in his Official Capacity Governor of the State of New York, MARK CHASSIN, M.D., in his official Capacity as Commissioner of Health of the State of New York, and SALVATORE R. CURIALE, in his Official Capacity as Superintendent of Insurance of the State of New York,
Defendants-Appellants,

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,
Intervenors-Appellants.

THE HEALTH INSURANCE ASSOCIATION OF AMERICA, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE LIFE INSURANCE COUNCIL OF NEW YORK, INC., AETNA LIFE INSURANCE COMPANY, AETNA HEALTH PLANS OF NEW YORK, INC., MUTUAL OF OMAHA INSURANCE COMPANY, THE UNION LABOR LIFE INSURANCE COMPANY, and PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC. TRUST,
Plaintiffs-Appellees,

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

Jeffrey J. Sherrin, being duly sworn, deposes and says:

1. I am a partner in the law firm of Sherrin & Glasel, attorneys for the Intervenor-Appellant Hospital Association of New York State. I am admitted to practice in this Court.

2. I submit this affidavit in opposition to the motion of The National Carriers' Conference Committee, as fiduciaries of The Railroad Employees National Health and Welfare Plan and The Railroad Employees National Early Retirement Major Medical Plan (hereinafter "the Railroad Plans"), for leave to serve and file an amicus brief.

3. First, the Court already has been favored with briefs from five sets of parties and from four amicus curiae, covering all of the issues. In particular, the interests of all self-insured plans, and the Railroad Plans specifically, are already represented. Plaintiff The Travelers Insurance Company ("Travelers") acts as fiduciary or otherwise provides administrative services to self-insured plans, including the Railroad Plans. Travelers has specifically lodged its complaint in such capacity. *See* JA-57-63. The additional brief which the Railroad Plans seek to submit is merely cumulative and does not provide the Court with any new positions or perspectives necessary for a full presentation of the issues.

4. More importantly, Intervenor-Appellant Hospital Association of New York State did not consent to the Railroad Plans filing an amicus brief because of the Plans' violation of the Stay Order of the District Court. A copy of our letter on behalf of the Hospital Association is annexed hereto. As the Railroad Plans' April 14, 1993 memorandum of law in support of their motion acknowl-

edges (at p. 3), the Railroad Plans have chosen to defy New York law and have refused to continue paying the 13% differential on hospital charges which is at issue on this appeal. While the court below found that differential preempted by federal law, the court stayed the portion of its Order directed to such 13% differential, pending the outcome of this appeal. *See* JA-1863-69. Accordingly, the 13% differential remains in effect, and the Railroad Plans' refusal to pay it amounts to willful defiance of the Stay Order and/or state law.

5. This circumstance was brought to the attention of the court below, and at a conference on April 15, 1993, Judge Freeh emphasized that the conduct of the Railroad Plans was directly contrary to the intent of the Stay Order. He therefore directed that an Order be submitted that will affirmatively direct all parties to pay the 13%. This proposed order is at present being circulated to all counsel for approval.

6. It is respectfully submitted that the Railroad Plans come before this Court with unclean hands. They have chosen to ignore the District Court's Stay Order and the Public Health Law, resorting to a self-help, but unlawful remedy. Having chosen this path of defiance, they should not be granted "Friend of the Court" status. Accordingly, their motion for leave to file an amicus brief should be denied.

/s/ Jeffrey J. Sherrin

Sworn to before me this 21 day of April, 1993.

/s/ Philip Rosenberg
PHILIP ROSENBERG
Notary Public, State of New York
Qualified in Albany Co. #5006761
Commission Expires 1/11/95

AMICUS CURIAE

BRIEF

(20) (21) (21)

Nos. 93-1408, 93-1414, 93-1415

In The

Supreme Court of the United States

October Term, 1994

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS and EMPIRE BLUE CROSS AND BLUE SHEILD,

Petitioners,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

(caption continued on reverse)

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR TRUSTEES OF AND THE PENSION, HOSPITALIZATION BENEFIT PLAN OF THE ELECTRICAL INDUSTRY AND TRUSTEES OF AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 HEALTH CARE FUND, TRUSTEES OF AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 RETAIL WELFARE FUND AND TRUSTEES OF AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 COMMERCIAL HEALTH CARE FUND AS AMICI CURIAE SUPPORTING RESPONDENTS

EDWARD J. GROARKE
COLLERAN, O'HARA & MILLS
Attorneys for Amici Curiae
1225 Franklin Avenue - Suite 450
Garden City, New York 11530
(516) 248-5757

16 pp

MARIO M. CUOMO, ET AL.,

Petitioners,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

HOSPITAL ASSOCIATION OF NEW YORK STATE,

Petitioner,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

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In The

Supreme Court of the United States

October Term, 1994

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS and EMPIRE BLUE CROSS AND BLUE SHEILD,

Petitioners,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

MARIO M. CUOMO, ET AL.,

Petitioners,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

HOSPITAL ASSOCIATION OF NEW YORK STATE,

Petitioner,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR AMICI CURIAE

STATEMENT OF THE AMICI CURIAE

This Memorandum is submitted on behalf of the *amici curiae*, TRUSTEES of and THE PENSION, HOSPITALIZATION BENEFIT PLAN of the ELECTRICAL INDUSTRY ("ELECTRICAL INDUSTRY PLAN" or "PLAN") and THE TRUSTREES of and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 HEALTH CARE FUND, TRUSTEES of and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 RETAIL WELFARE FUND, as well as THE TRUSTEES of and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 COMMERCIAL HEALTH CARE FUND (collectively, "U.F.C.W. FUNDS" or "FUNDS"), in support of the arguments raised by the Respondents on this appeal.

Each of the *amici* plans is an "employee welfare benefit plan" as defined in the Employee Retirement Income Security Act of 1974, as amended ("E.R.I.S.A."). *See* 29 U.S.C. §1002(3). The trustees of each plan are fiduciaries as defined in E.R.I.S.A. *See* 29 U.S.C. §1002(21). The plans are established and maintained pursuant to collective bargaining agreements with multiple employers for the sole and exclusive purpose of providing and maintaining health care benefits, such as medical, surgical and hospital care, for its participants and their beneficiaries. Each plan currently provides one hundred (100%) percent coverage for all reasonably necessary hospitalization charges. Each plan was established pursuant to the Labor-Management Relations Act §302, 29 U.S.C. §186, and operates on a self-insured basis without stop-loss insurance coverage.

Pursuant to New York's Public Health Law ("P.H.L.") §2007-c(1)(b), the rate of reimbursement to hospitals for care rendered to inpatients enrolled in a self-

insured employee welfare benefit plan which provides for reimbursement directly to hospitals on an expense incurred basis, such as those of the *amici curiae*, is the applicable D.R.G. rate plus an additional "payor differential" of thirteen (13%) percent. In addition, P.H.L. §2807-c(1)(a)(iii) and 2807-c(14)(a)-(c) provide for a bad debt and charity care ("B.D.C.C.") allowance to be added onto each bill for inpatient hospital services rendered by a New York hospital. The B.D.C.C. surcharge was intended to compensate hospitals for services rendered to uninsured, underinsured, and the indigent patients which, in fact, requires the ELECTRICAL INDUSTRY FUND and the U.F.C.W. FUNDS to make payments for care rendered to non-participants and non-beneficiaries of the plan.

Each of the referenced statutorily mandated charges are the subject of an action now pending in the Eastern District of New York entitled *"Trustees of and The Pension, Hospitalization Benefit Plan of the Electrical Industry et al. v. Cuomo"*, CV-92-5589 (SJ).[1] In that action, the *amici curiae* seek to declare that, with regard to self-insured Taft-Hartley welfare plans, the two cited statutes are null and void and unenforceable as preempted by federal law. The plaintiffs in that action seek a permanent injunction as to the enforcement of those statutes against them. Of particular concern to the *amici curiae* is the precedential effect the holding in this matter will have on their E.R.I.S.A. §514(a) preemption argument.[2] In an effort to preserve their own legal

[1] The motions and cross-motions for summary judgment in that action have been placed on hold pending this Court's determination on the instant appeal.

[2] The *amici curiae* have alleged in their federal action that compliance with the state mandates of 13% payor deferential and 6% B.D.C.C.

theories for the trial court in *Trustees v. Cuomo*, as well as to demonstrate to this Court the repercussions of its holding at bar, the *amici curiae* submit this Memorandum in support of the Respondents in this appeal.

Whereas both commercial insurers and self-insured funds are referenced in P.H.L. §2807-c(1)(b), the thrust of the underlying action has been focused on the commercial insurers. On this appeal, the *amici curiae* shall emphasize the concerns of Taft-Hartley self-insured funds so that this Court will become cognizant of the dramatic consequences of the thirteen (13%) percent "payor differential" on all such plans which must live with its wrath.

ARGUMENT[3]

The ELECTRICAL INDUSTRY PLAN and the U.F.C.W. FUNDS each pay approximately six (6%) percent on bills it receives from its participants and their beneficiaries for bad debt and charity care ("B.D.C.C."). When coupled with the thirteen (13%) payor differential, this Court can see that these surcharges create a

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challenged therein places the trustees at risk of violating their fiduciary duty as codified in E.R.I.S.A.'s "exclusive benefit rule". E.R.I.S.A. §403(c)(1) and 404(a)(1)(A), 29 U.S.C. §§1103(c)(1) and 1104(a)(1)(A). The trustees are placed in an unenviable position of complying with both E.R.I.S.A.'s mandate to act "solely in the interest" of participants and beneficiaries and the "community interest" mandate by the state in the P.H.L. by means of surcharges for the care of non-participants and non-beneficiaries. This argument was not raised at bar by Respondents, thus, will remain unaffected by this Court's holding.

[3] In the interest of brevity, the *amici curiae* adopt the Statement of Issues and Factual Background as drafted by Respondents, *Travelers Insurance Company, Inc., et al*, in their Memorandum filed with this Court on this appeal.

substantial adverse economic impact on these employee welfare benefit plans.

1. Effect:

Based on affidavits filed by the fund administrators of the *amici curiae* in *Trustees v. Cuomo*, it has been established that the ELECTRICAL INDUSTRY FUND expended $3,634,466.00 for B.D.C.C. in the period 1990-92. During the same period, the U.F.C.W. FUNDS expended $631,289.00 for B.D.C.C. The payor differential which is the subject of this appeal costs each of the funds more than two times what they spent on charity care! In a time when employer contributions are declining, the impact of these surcharges threatens to cripple the operation of these employee welfare benefit plans. As an example, the ELECTRICAL INDUSTRY PLAN has experienced a net decrease in that fund's balance for 1991 of seven million dollars and a further net decrease for 1992 of twelve million, two hundred thousand dollars!

Such an impact was the proximate cause of the trustees' amendment to the plan documents of the ELECTRICAL INDUSTRY PLAN to decrease the benefits offered to the participants and their beneficiaries. The employer contribution rate was increased as was the deductible for both individual and family subscriptions to that welfare plan. The schedule of reimbursement for covered medical services was calculated on a usual and customary schedule which resulted in significant co-payments for participants whose doctor's fees exceed the allowable charges contained in the PLAN. Additionally, the prescription drug benefit was amended to reimburse participants for the cost of prescription drugs based on the costs of generic equivalents.

The P.H.L. subjects the ELECTRICAL INDUSTRY PLAN (which has participants in numerous states) to inconsistent state regulation since the PLAN is required to pay for services rendered in hospitals in other states. For instance, the B.D.C.C. surcharge is not universal. It is just such "patchwork regulation" which E.R.I.S.A. was designed to eliminate. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) quoting Representative Dent and Senator Williams.

As self-insured funds, the *amici curiae* have demonstrated in *Trustees v. Cuomo* that these surcharges result in *direct* out-of-pocket losses constituting reduction in fund reserves. As a result, the self-insured welfare fund has less protection against catastrophic loss. Additionally, the fund administrators have pointed to the lost interest income and investment opportunities as a result of the drain on the FUNDS' treasury caused by these state mandated surcharges.

2. <u>Theory:</u>

The plaintiffs in *Trustees v. Cuomo* have theorized, in part, that the surcharges are preempted by E.R.I.S.A. §514(a), based on Supreme Court precedent, since the state statutes challenged therein "relate to" an employee benefit plan because it has a "connection with" such plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). *See also, District of Columbia v. Greater Washington Board of Trade*, 506 U.S.____, 113 S.Ct. 580, 583 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 483 (1990). Specifically, the employee welfare benefit plans argue, in part, that there is a "connection with" the plans and the payor differential

and B.D.C.C. surcharges since the challenged state statutes:

1. have a substantial adverse economic impact upon self-insured welfare plans;[4]

2. require the funds to reimburse the participants and their beneficiaries at thirteen (13%) percent and six (6%) percent, respectively, above the level obligated to be paid under the plan documents;

3. require an increase in the administrative burden of providing for a uniform level of benefits nationwide in the face of inconsistent state regulation over hospital reimbursement;

4. impose upon E.R.I.S.A. plans the necessity to structure benefits so as to include non-participants and non-beneficiaries, thus, affecting relations among principal plan entities; and

5. impact on core decisions which self-insured, union welfare benefit plans must render as to how to finance their participants' and beneficiaries' inpatient hospital care in the most cost-efficient manner.

3. <u>Circuit Court Decision in Travelers:</u>

The Circuit Court in *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), held that the thirteen (13%) percent payor differential was preempted by E.R.I.S.A. §514(a) since the state law has a "connection with" an

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[4] As contrasted with the Respondents' insured plans, the state surcharges for inpatient hospital services create a *direct* out-of-pocket loss for the self-insured PLAN and FUNDS.

employee welfare benefit plan. The Circuit Court rationalized its holding by stating that the state statute had an indirect economic impact upon E.R.I.S.A. plans which was substantial and impermissibly affected the structure, administration, or the type of benefits furnished by the welfare plan. "The surcharges substantially increase the cost to E.R.I.S.A. plans of providing beneficiaries with a given level of health care benefits." *Id.* at 720. Additionally, the thirteen (13%) percent payor differential effects the plan's determination of how best to fund their level of benefits.

In the *Travelers* case, the Circuit Court drew the following conclusions of law which are of great importance to the *amici curiae* in *Trustees v. Cuomo* which they would like to see this Court adhere to in its decision on this appeal:

a) the challenged surcharges "relate to" E.R.I.S.A. plans because they have a "connection with" such plans;

b) *Rebaldo v. Cuomo,* 749 F.2d 133 (2d Cir. 1984), *cert. denied* 472 U.S. 1008 (1985) is no longer good law;

c) disavowed the Third Circuit's majority ruling in *United Wire, Metal & Mach., Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S.Ct. 382 (1993) and cited favorably to Judge Nygaard's dissent in that case;

d) the thirteen (13%) percent payor differential "...force[s] E.R.I.S.A. plans to increase either plan costs or reduce plan benefits", *id.* at 720, thus, impermissibly affects the structure, administration, or the type of benefits furnished by a plan; and

e) found that differentials in rates of payment to hospitals by various classes of payors "...purposely interfere with the choices that E.R.I.S.A. plans make for

health care coverage" because such surcharge "substantially increase[s] the cost to E.R.I.S.A. plans of providing beneficiaries with a given level of health care benefits." *Id.* at 719-720.[5]

4. Policy Considerations:

The PLAN and FUNDS' action does not seek to challenge New York's authority to regulate hospital costs, but only the methodology used to reimburse hospitals for inpatient services. The *amici curiae* are concerned that self-insured E.R.I.S.A. plans pay disproportionately to underwrite the social contract of providing care to uninsured and underinsured patients when such noble endeavors are more equitably achieved by a tax of general application rather that this "sick tax" imposed on patients and their health care insurer. As demonstrated above, the increased financial burden on the welfare plans to fund the B.D.C.C. and payor differential surcharges reduces the benefits to plan participants threatening the continuation of the current level of benefits, especially to retirees. The hospital reimbursement add-ons mandated by the P.H.L., increase the costs of health benefits on the employer resulting in the de-stabilization of collective bargaining where wage increases have been depressed recently in order to minimize further reductions in health care benefits. Finally, the add-ons subsidize non-union, non-contributing employers who often do not provide

[5] Despite the success of the E.R.I.S.A. preemption argument below, the payor differential remains because, due to the addition of §162(n) to the Internal Revenue Code, employers in New York will lose certain tax deductions relating to the costs of providing health care coverage to participants if their plans do not pay the New York mandated surcharges, including the differential. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 §13442, 107 Stat. 568.

health care to their employees, thus, creating for them an unfair competitive advantage over employers who make contributions to employee welfare benefit plans on behalf of their employees. "The Act provides a conduit by which money is transferred from, among others, E.R.I.S.A. plans to hospitals. Rather than spend its own general funds, New Jersey implemented a money transfer scheme where E.R.I.S.A. plans subsidize the medical bills of those who are favored by law." *United Wire, Ibid.*, 995 F.2d 1179, ____ (3d Cir. 1993), quoting from Judge Nygaard's dissent.

5. Recent Law:

Despite Petitioners' claim to the contrary in *Trustees v. Cuomo*, the B.D.C.C. add-on is not a normal cost of doing business. Such surcharge differs from normal overhead costs since the plan participants and their beneficiaries of self-insured Taft-Hartley welfare funds derive no benefit from this add-on while contributing to none of its need. Further, this surcharge is not equitably distributed since it is only paid by a small portion of the general populace. The marketplace analogy for charity care constitutes a poor template since no vendor would knowingly sell to a customer whom it knew could not pay in full. Additionally, in the marketplace, vendors spread their bad loss (as the *amici curiae* contend is appropriate) throughout its *entire* customer base and not a few "well-heeled" customers.

Recent opinions filed since the Circuit Court ruled in *Travelers* further justify the *amici curiaes'* claims and negate Petitioners' defenses in *Trustees v. Cuomo*. In *New England Health Care Employees Union District 1199, S.E.I.U. et al. v. Mount Sinai Hospital*, 846 F. Supp. 190, 198-199 (D. Conn. 1994), then Chief Judge

Cabranes held that Connecticut's Uncompensated Care Pool Act was preempted by E.R.I.S.A. §514(a), 29 U.S.C. §1144(a). Judge Cabranes also denied the state's Medicaid defense (also raised in *Trustees v. Cuomo*), that is, that a finding of preemption of the state law will "impair" another federal statute, thus, it should be saved by E.R.I.S.A. §514(d), 29 U.S.C. 1144(d). Since Section 514(d) is not a general savings clause to Section 514(a), the court's conclusion that "[n]othing in the Medicaid Act requires states to impose health-care related taxes which pass the costs of uncompensated care onto paying patients" was crucial in denying such defense. The court found that uncompensated care can be funded in a variety of alternate ways, such as real estate, income, and sales taxes. Since the Madicaid Act does not depend on the challenged state law for its enforcement, the federal act would not be "impaired" by a finding of E.R.I.S.A. preemption. See also *Connecticut Hospital Assn. v. Pogue*, _____F. Supp. _____ (D. Conn. Nov. 17, 1994), Judge Covello: Connecticut's newly created uncompensated care financing mechanism — six (6%) percent sales tax on patient services as sell as an eleven (11%) percent tax on gross hospital revenues — was preempted by E.R.I.S.A. The District Court reasoned that the new state law was targeted at the health care industry — a venue where E.R.I.S.A. plans must operate. Additionally, Judge Covello reasoned that the new state law had "...a substantial economic impact on E.R.I.S.A. plans, causing such plans to either increase costs or reduce benefits..."[6]

The Second Circuit recently held that P.H.L. §2807-d, which imposes a .006% tax on gross receipts of

[6] Judge Covello also denied the Medicaid defense pursuant to similar reasoning utilized by Chief Judge Cabranes in *New England Health Care Employees Union, Ibid.*

two medical centers operated by an employee welfare benefit fund was preempted by E.R.I.S.A. *NYSA-ILA and Clinical Services Fund v. David Axelrod, M.D.*, 27 F.3d 823 (2d Cir. 1994). The Court reasoned that P.H.L. §2807-d has a "connection with" the employee welfare benefit fund since the state mandated tax will cause the fund to reduce benefits and/or increase costs. It is just such legal rationale which the *amici curiae* believes should be continued if the cost of health care is to be equitably financed in our nation.

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment below.

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Respectfully submitted,

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